



Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's the Will of the People

Citation

Vicki C. Jackson, Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's the Will of the People, 13 U. Pa. J. Const. L. 413 (2014).

Published Version

<http://scholarship.law.upenn.edu/jcl/vol13/iss2/8/>

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:12942291>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Open Access Policy Articles, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#OAP>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

**DEMOCRACY AND JUDICIAL REVIEW, WILL AND REASON,
AMENDMENT AND INTERPRETATION: A REVIEW OF BARRY
FRIEDMAN'S *THE WILL OF THE PEOPLE***

Vicki C. Jackson *

In 1997, the Supreme Court of the United States decided two constitutional cases, each dealing with the scope of congressional power. In each case, the Court held a federal statute unconstitutional. *City of Boerne v. Flores*,¹ the better known of the two, found unconstitutional the Religious Freedom Restoration Act, passed by overwhelming numbers in both Houses of Congress in 1993 in response to the Court's 1990 decision in *Employment Division v. Smith*,² which had abandoned prior constitutional requirements to accommodate certain religiously motivated conduct. The Court in *City of Boerne v. Flores* concluded that Congress had overstepped its bounds, failing to appreciate that its powers under Section 5 of the Fourteenth Amendment were only to enforce Section 1's prohibitions—as the Court understood them. In language widely viewed as an effort to foreclose congressional dialogue with the Court about constitutional interpretation, the Court wrote:

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.³

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. The author thanks Frank Michelman, Geoffrey Stone, Mark Tushnet, Jeff Clements, Marge Baker and Bob Taylor for their helpful discussions or comments and, of course, Barry Friedman, for his remarkable book that provides occasion for these reflections. My thanks as well to James Razick for his able research assistance.

¹ 521 U.S. 507 (1997).

² *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (upholding application of a general ban on peyote to sacramental use of the substance).

³ *Boerne*, 521 U.S. at 535–36 (citations omitted).

In several subsequent cases, the Court found federal statutes or portions thereof to be unconstitutional, as exceeding Congress's Fourteenth Amendment powers as limited by *Boerne*.⁴

The other 1997 case, somewhat less far-reaching, was *Printz v. United States*.⁵ It, too, involved a statute enacted only a few years earlier, as a part of the 1993 Brady Handgun Act. The Court in *Printz* held that a provision requiring local law enforcement officers to perform background checks on would-be gun purchasers for five years was an unconstitutional "commandeering" of state officials. The dissenting opinions argued that the Constitution's text was silent on the issue; the Federalist Papers seemed to assert that state executives would be called on to implement federal law; and other sources were weak or at best ambiguous on whether Congress had such power.⁶ It was, Justice Breyer's dissent argued, therefore reasonable to consider the experience of other federalisms in order to determine what the consequences of this statute were likely to be for a healthy U.S. federalism; and in light of experience in robust European federalisms with centralized requirements implemented by subnational officials, the federal statute should be upheld.⁷ Justice Scalia, writing for the majority, rebuffed this effort to learn from comparative constitutional experience: "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."⁸

In each of these cases, the majority sought to wall off interpretive sources from "outside" a very limited set of materials focused primarily on the Court's own precedents. A real accomplishment of Barry Friedman's superb book, *The Will of the People*,⁹ is to show how unavailing efforts are to entirely wall constitutional law off from the domain of public experience and opinion. Friedman's narrative has a richness of detail, a sense of mastery of large-scale historical trends, and an ease and elegance of writing that will surely make this required

4 See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000).

5 521 U.S. 898 (1997).

6 E.g., *id.*, at 945-54 (Stevens, J., dissenting); *id.* at 976-78 (Breyer, J., dissenting). See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998) (criticizing *Printz*'s reasoning and its categorical anti-commandeering rule, and arguing for a more flexible approach to judicial enforcement of federalism-based limits on congressional power).

7 *Printz*, 521 U.S. at 976-78 (Breyer, J., dissenting).

8 *Id.* at 921 n.11.

9 BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

reading for all serious students of constitutional history. For Friedman, it is the ongoing interaction between the Court and the public—in its various manifestations through legislative and executive activity, as well as more general public opinion—that constitutes the genius of the American system of judicial review. After reading Friedman's book, one can have no question that shifting understandings of the relationship between law and society presently, and will continue to, influence the Court's understanding of the Constitution. Indeed, in a constitutional democracy with a difficult to amend constitution, it is hard to imagine that the Court or the Constitution could otherwise survive.

Friedman's fine book raises many questions, both positive and normative. As a positive matter, it is not clear whether the book demonstrates the influence of public opinion, or of major power holders, or what the relationship between these two are. Moreover, it is not clear what public opinion is, or whose views count. Is it the views of Gallup and other polls? Is it the views of editorial writers? Or is it the views of elected legislatures? Is it something expressed over generations or something expressed in shorter time cycles? Further, what are the mechanisms by which shifts in public or legislative opinion affect the Court, and how do they relate to each other and the larger process Friedman describes? Part I addresses these questions.

The book also raises important normative issues. Friedman insists on the following questions' importance: Is adjudication in the U.S. Supreme Court sufficiently *independent* from public opinion? Is it sufficiently "countermajoritarian"? Friedman does *not* propose that public opinion should in some way "count" as an independent factor in constitutional adjudication, from an internal perspective of how the Court conceptualizes its work. But if part of the normative grounding of the Court's legitimacy lies in its relationship to public opinion, what principles should guide the justices in deciding whether public opinion is or is not relevant on a particular point of constitutional law? Or is the question purely a prudential one? And if the Court's legitimacy is grounded in its relationship to U.S. public opinion, does this have implications for the relevance of foreign experience? Do we need a new constitutional theory to accommodate the answer to these questions? I discuss these normative issues of interpretation in Part II.

Finally, the work implicitly raises questions about the role of formal amendment under Article V of the Constitution and its relationship to legitimate interpretation. If, as Friedman provocatively argues, the "people" in 1937 decided that the Court had power to amend the Constitution, then what, if anything, is left for Article V?

Should we adopt a presumption against amendment, so as to avoid what Kathleen Sullivan describes as “constitutional amendmentitis”?¹⁰ Or does Friedman’s work implicitly suggest a parallel risk of “constitutional amendophobia”? I discuss this briefly in Part III, in the context of the Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*.¹¹

I. WHAT IS THE STORY?

This part proceeds by way of a series of questions about the positive account Friedman offers.

Whose will? A striking element of the rich history Friedman provides is its description of the array of influences to which the Court has responded—not always “the people,” but sometimes to more particular power holders. So, in describing the late nineteenth century, he writes: “By abandoning blacks and embracing corporations the Court rose to the pinnacle of power.”¹² Perhaps what his historical work shows is the Court’s responsiveness over time to *power holders*, a point that may be of some salience in this period of time after *Citizens United*.

This positive point may have normative implications. If it is the dialogue with the people that helps legitimate the Court’s power of judicial review in a democracy, the quality and nature of the Court’s dialogue depends on the quality of the democracy in which it operates. If it is the people who hold and exercise power, then dialogue with that power holder will enhance the democratic accountability of the Court and address the countermajoritarian difficulty. If, however, power vis-à-vis the Court is held or exercised by bodies other than the people, or is distorted by corrupt or abusive influences in the body politic, Friedman’s response to the countermajoritarian difficulty is perhaps correspondingly weaker,¹³ unless we believe that public opinion can be clearly manifested without regard to these distortions.

¹⁰ Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Sept. 1995, available at http://www.prospect.org/cs/articles?article=constitutional_amendmentitis; see also Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691 (1996) [hereinafter Sullivan, *Constitutional Constancy*].

¹¹ 130 S. Ct. 876 (2010) (holding that independent corporate expenditures for electioneering communications cannot be prohibited under the First Amendment).

¹² FRIEDMAN, *supra* note 9, at 138; see also *id.* at 186 (referring to “electoral dysfunctions” as impairing judicial reform in the early twentieth century). Where there are “electoral dysfunctions,” in what form is the “will of the people” heard?

¹³ On the other hand, if the product of the democratic process in the form of legislation is not itself entitled to respect as representing the will of the majority because of distortions or corruption, the countermajoritarian difficulty may be correspondingly diminished.

More generally, one might ask whether under Friedman's view the public can develop "a will," apart from that crystallized in the decisions of the public's representative bodies. Sometimes, perhaps, it does. But how often is our perception of public will an artifact, for example, of polling? Or of the particular moment one election is held? Do we care about the "will" as expressed in passive response to pollsters' questions, or the "deliberative" will of the people's representatives acting in legislative bodies? Given differential intensity of preferences and differential willingness or capacity of advocates and opponents to mobilize grassroots sentiment, legislation may be enacted that a majority is not especially happy with. What should be regarded as the will of the people?

Indeed, the people may not have "a" will but multiple "wills," whose existence complicates what Friedman memorably calls the "bungee cord" or outer range of public tolerance of the Court's decisions.¹⁴ For example, Friedman describes congressional reaction to a series of decisions in 1956 and 1957 that were criticized as unduly protecting the rights of Communists.¹⁵ The public criticism and legislative moves towards limiting the Court's jurisdiction or overruling a preemption decision to allow state prosecutions of suspected subversives, he suggests, may have contributed to the Court's retrenchment the following term. But what was the will of the people—was it represented by the criticism? By the proposed legislation? Or by the failure to enact the proposed legislation?¹⁶ Friedman comments, in a footnote, that "[w]here the broader public stood precisely in all this is anyone's guess."¹⁷ If not by the proposed legislation, Friedman suggests, perhaps the Court (or specifically, Justices Frankfurter and Harlan) was affected by serious academic criticism of the Court's "activism" or claimed lack of principle in *Brown v. Board of Education*.¹⁸ Yet there have been other periods with harsh attacks on the Court

14 FRIEDMAN, *supra* note 9, at 373. For a critique of Friedman for confusing the views of editorial writers with popular views in connection with the 1940s Jehovah's Witnesses cases, see Justin Driver, *Why Law Should Lead*, NEW REPUBLIC, Apr. 8, 2010, at 28, 30.

15 FRIEDMAN, *supra* note 9, at 252-54.

16 On the more general problem of reading the "sounds of [legislative] silence," compare, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 262 (arguing that "even in the context of a statute's amendment, Congress's failure to 'correct' a settled interpretation cannot be equated with an affirmative intention to ratify that interpretation") with Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 512-13 (suggesting that congressional inaction or silence can be a relevant interpretive tool).

17 FRIEDMAN, *supra* note 9, at 514 n.175.

18 347 U.S. 483 (1954). For Friedman's description of Learned Hand's and Herbert Wechsler's attacks on the Court, see FRIEDMAN, *supra* note 9, at 256-57.

from, for example, the American Bar Association, which did not appear to have any such effects.¹⁹ The connection between public critique of *Brown* and the Justices' shifts on the subversive cases is at best complex, for while the shift may have been away from "activism," it arguably opened up the Justices to further criticism for departing from principle.²⁰

If the *failed* legislation in response to the 1957 domestic security cases represented the will of the people—or the possibility in the future of developing a constraint on public tolerance—what was the role of public opinion in perhaps the most famous decision of the post-World War II period, *Brown v. Board of Education*? Friedman reports that the summer *after Brown* was decided, public opinion was running slightly in favor of the decision (though not in the South); and under Friedman's theory, it matters less whether the Court led or followed, so long as the decision was within what the society would accept. But while Friedman discusses as part of the "path to *Brown*" shifting public opinion arising out of revulsion against the German racist practices, he does not discuss the almost successful legislative effort, in early 1954, to add the so-called "Bricker Amendment" to the Constitution.²¹ The proposed Bricker Amendment was designed to limit the domestic legal effects of treaties; it came within one vote of passing the Senate in 1954, just months before *Brown* came down. One of the several concerns of some proponents of this amendment was to prevent reliance on the UN Charter, the Universal Declaration of Human Rights, or other human rights instruments to invalidate state segregation laws.²² If introduced but not enacted legislation af-

19 See, e.g., William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 487–92 (2002) (noting attacks on the Court between 1937 and 1954, including virulent attack in 1939 by the President of the ABA as well as threats of impeachment, and academic attacks of comparable sharpness in the same time period).

20 See, e.g., FRIEDMAN, *supra* note 9, at 254–55 (noting observers' concerns that the Justices were "reversing course in response to public discontent and threats of political reprisal").

21 For a brief summary and thoughtful treatment, see Louis Henkin, *U.S. Ratification Of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348–50 (1995). For longer treatments, see sources cited *infra* note 22.

22 See DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* 70–71 (1988) ("Southern Democrats found the Bricker amendment particularly appealing because of their fear that the United Nations Charter, the Genocide Convention, or a covenant on human rights could be used to invalidate segregation laws in the various states or enact federal civil rights legislation."); see also DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 340–42 (1996) (describing Senator Bricker's proposed constitutional amendment as a direct response to the UN's human rights initiatives); cf. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 44–45

ter the 1957 subversives cases is arguably relevant evidence of public opinion, what would Professor Friedman say about the Bricker Amendment? True, Bricker was not a direct response to a Supreme Court decision. It might simply have been viewed as being in a different domain from the issues in *Brown*—as being primarily concerned with the effect of treaties—and thus not salient.²³ Yet its public importance in the period while *Brown* was pending in the Supreme Court suggests the need to explore further the questions raised in this section about Friedman’s method and meaning.

The larger point has to do with methodology and causal claims. It is somewhat problematic to ascribe to *failed* legislative efforts a distinctive public will to which the Court can be described as conforming. The elegance of Friedman’s writing may obscure a bit of the “chronology equals causality” assumption, and its attendant possibilities of error, arguably at work in this seemingly seamless narrative.

Friedman concludes that “[i]t is apparent time and again that what the Supreme Court responds to most often is the sustained voice of the people as expressed through the long process of contesting constitutional decisions.”²⁴ But the “sustained voice” claim is in some tension with the more short term stories Friedman tells in the late 1950s, or (with respect to the Equal Rights Amendment) in the 1970s. Moreover, the notion that the constitutional law we get is, generally speaking, what a majority wants, seems doubtful. On many issues of constitutional law, contemporary majorities may have no will, as the issue has not risen to public notice except among a relatively small group of those most affected—for example, the details of Fourth Amendment search and seizure law, or Fifth Amendment self-incrimination law, or what counts as double jeopardy. On other issues, what the majority says it wants may, depending on the issue, be a product of how questions are phrased in public opinion polls.²⁵ And in some cases a powerful social movement may have a momentum

(2000) (discussing NAACP’s 1947 petition to the U.N. to protest and investigate racial discrimination in the United States).

²³ My thanks to Mark Tushnet for the point about domains.

²⁴ FRIEDMAN, *supra* note 9, at 383.

²⁵ George Gallup noted long ago that on some issues responses to public opinion polls were very sensitive to the wording used, while on other issues there was more stability of opinion expressed. See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 94–95 (2002). For more recent studies, see Graham Kalton et al., *Experiments in Wording Opinion Questions*, 27 APPLIED STAT. 149 (1978). Cf. Robert M. Groves, *Research on Survey Data Quality*, 51 PUB. OPINION Q. S156 (1987); Jennifer Jerit, *Issue Framing and Engagement: Rhetorical Strategy in Public Policy Debates*, 30 POL. BEHAV. 1 (2008) (discussing impact of different rhetorical strategies on public opinion).

behind it without clarity on what a “majority” supports.²⁶ Maybe Friedman’s argument could be better understood as a claim that the Court’s rulings generally stay within what a majority of “the people” do not strongly and sustainably object to. But this weakens the force of Friedman’s assertion that the Court’s decisions are “ratified” by the people;²⁷ they may simply be acquiesced to because they are not strongly opposed by relevant pluralities.

But does the historical narrative Friedman offers persuade the reader of the accuracy of Robert Dahl’s observation that the Court’s decisions will not stay out of line, for too long, from the preferences of those who hold power in the law-making branches of government?²⁸ Generally, yes. Friedman contributes to a line of scholarship on the relationship of Supreme Court decisions on issues of public moment and public opinion, going back at least to James Bryce’s observation in 1891 that public “[o]pinion is stronger in America than anywhere else in the world, and judges are only men. . . . A court is sometimes so swayed consciously, more often unconsciously, because the pervasive sympathy of numbers is irresistible.”²⁹ Does Friedman’s work cast light on the mechanisms by which this occurs? The answer here is less clear.

What are the mechanisms for the Court’s sensitivity to public opinion? Friedman’s work explores the interaction of a number of complex mechanisms,³⁰ or means, by which the Court’s decisions stay more or

26 Friedman notes the importance of social movements in constructing public views. There is no doubt that social movements are important in this way, but the success of a social movement in changing discourse, e.g., on the Second Amendment, or on campaign finance, does not tell us what “will of the people” is; majority views may be up for grabs for a long time. Cf. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1356 (2006) (discussing the “consent condition” for constitutional contestation while acknowledging that “because the consent condition does not guarantee speakers equality of resources or authority, it can naturalize radically antidemocratic forms of subordination” and that in a “constitutional order . . . marked by social stratification or [unequal] opportunities for democratic voice . . . the consent condition . . . will reproduce and legitimate these conditions”). Social movements may expand the range of plausible interpretive choice without necessarily yielding a clear will of the people. No doubt that the Court is over time responsive, but a stable equilibrium on particular decisions or issues may not occur as often as the book suggests.

27 FRIEDMAN, *supra* note 9, at 381.

28 See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 293 (1957) (observing that “the Supreme Court is inevitably a part of the dominant national alliance”).

29 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 267 (2d ed. 1891).

30 I am *not* using the word “mechanism” here in the technical sense of academic economics. Cf. Roger B. Myerson, *Mechanism Design*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS ONLINE* (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008), *available*

less in line with what “the people” are willing to accept. Among the mechanisms his work touches on are the following: 1) appointments and the effects of changing membership; 2) sitting justices changing their views, whether consciously or unconsciously, under the persuasive influence of shifts in public or elite opinion; and 3) sitting justices changing their views, again, whether consciously or unconsciously, under the influence of (a) more seemingly coercive forms of influence, including threats or action by the political branches manifestly designed to restrict, influence or constrain the Court’s decisions, or perhaps (b) the possibility of resistance or noncompliance that is anticipated.

As Friedman observes, his claim is that constitutional interpretation works to stay in rough balance with public opinion not so much because the Court is wise or discerning, but because the process of constitutional adjudication occurs over time, and through a regular process of decision, response, and, in cases of continuing controversy, repeated opportunities to re-decide similar issues as public views play out over time.³¹ The possibility of repeat litigation over similar issues, present in part because of the decentralized and common law structures in which the Supreme Court operates, in part because of the large and federal character of the nation, which sustains many different governments, is an important aspect of the mechanisms Friedman has identified to account for the Court’s sensitivities to public opinion. Yet the insight raises many questions, including the degree to which changes in membership—taking place over the time period of iterative litigation—are responsible for the Court’s shifts, or how often instead changes in judicial doctrine result from the conscious or unconscious reactions of judges to public opinion, political branch action, or feared resistance.

A considerable literature has arisen to debate whether the Court votes “sincerely” in accord with the Justices’ own views, or “strategically” in light of (*inter alia*) the tolerances and expected reactions of the political branches.³² Each of these modalities might be thought to

at http://www.dictionaryofeconomics.com/article?id=pde2008_M000132 (describing a “mechanism” as a “specification of how economic decisions are determined as a function of the information that is known by the individuals in the economy,” and a “mathematical methodology for analyzing [sic] economic efficiency subject to incentive constraints,” entailing both “incentive constraints” and “resource constraints”).

³¹ FRIEDMAN, *supra* note 9, at 382–84.

³² See generally Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 Emory L.J. 583 (2001) (describing the debate between “attitudinalist” and “strategic voting” models, and arguing for a more strategic understanding of the voting behavior of Supreme Court justices).

correspond to different mechanisms for sustaining a relationship between public views and court decisions: the appointment process, by which new Justices with sincere convictions different from the prevailing jurisprudence may join the Court, and the interaction between political signals by external actors and the internal deliberative process by which Justices take account of the range of factors, including prudential concerns about expected reactions.

Friedman's work offers tantalizing glimpses of each of these modalities. For example, Friedman suggests, shifts in Justices Frankfurter's and Harlan's votes after the 1957 Communist Party cases appear likely to be (at least in part) a reaction to expressions of unhappiness with the Court from Congress, the ABA, or legal scholars;³³ and, he also suggests, Stewart's and White's switch to support for state death penalty statutes after *Furman v. Georgia*³⁴ is likely attributable to public views.³⁵ But to establish that Justices Frankfurter and Harlan voted insincerely might require more. Judges, no less than other people, have a high capacity to convince themselves of the rightness or correctness of what is strategically advantageous; distinguishing conscious choice from unconscious influence is thus a challenge.³⁶ On the death penalty cases, the accepted legal doctrine makes the permissibility of a punishment under the Eighth Amendment dependent on "evolving standards of decency," including what is generally re-

³³ FRIEDMAN, *supra* note 9, at 250–62.

³⁴ 408 U.S. 238 (1972).

³⁵ FRIEDMAN, *supra* note 9, at 285–88. Since much of the uproar over the subversives cases built on Southern unhappiness with the Court over *Brown*, it is worth noting that three weeks after the Jenner-Butler jurisdiction stripping bill failed to pass, the Court issued its unanimous decision in *Cooper v. Aaron*, 358 U.S. 1 (1958)—certainly not the move of a chastened body. See Ross, *supra* note 19, at 508 ("Although the defeat of the Jenner-Butler Bill three weeks before the Court decided *Cooper* may have emboldened the Court, many liberals preferred to argue that the narrowness with which the measure was defeated made *Cooper*'s uncompromising language all the more remarkable."). But cf. DUDZIAK, *supra* note 22, at 115–51 (situating *Cooper* in Cold War foreign affairs, as a defense of *Brown* and thus a blow against Communism); Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32, 35 (2004) (describing how the press called *Brown* a "[b]low to [c]ommunism").

³⁶ One might want to know more, from the Court's internal records, about whether in the later cases these Justices acted inconsistently with their own earlier views. For example, Professor Friedman lists, as among the post-1957 cases in which Justice Frankfurter voted with the government, *Scales v. United States*, 367 U.S. 203 (1961). See FRIEDMAN, *supra* note 9, at 515 n.178. Yet according to *The Supreme Court in Conference (1940–1985)*, at 300–07 (Del Dickson, ed., 2001), excerpting from internal conference notes in *Scales*, initially heard in 1956, and then reargued more than once, Frankfurter indicated that the law under which *Scales* was initially prosecuted was "unwise" but not "unconstitutional"—on November 2, 1956, well before the 1957 release of decisions that led to the public reaction Friedman describes. *Id.* at 302.

garded as “cruel and unusual”³⁷—state enactment of new death penalty laws after *Furman* may have gone to this criteria. Although Friedman suggests that Justices White and Stewart could not have believed that the arbitrariness that troubled them in their opinions in *Furman* would be cured by the new statutes,³⁸ the new statutes’ attempts to regulate discretion, combined with changing societal indicators of what is regarded as “cruel and unusual,” may have—within the domain of legal doctrine—played a role in their decisions.

In the alternative modality, to the extent change in the direction of public opinion is also reflected in a change in personnel, such an account may jive entirely with a “sincere” voting account (albeit a diminished role for *stare decisis*). The appointment process plainly played a significant role in many of the episodes Friedman talks about—including both *Lawrence v. Texas*³⁹ (which overruled *Bowers v. Hardwick*)⁴⁰ and the lead up to *Boerne v. Flores*.⁴¹ Even in the move from *Furman* to *Gregg v. Georgia*,⁴² the replacement of Justice Douglas with Justice John Paul Stevens (who voted with Stewart to uphold the Georgia statute in *Gregg*) may have resulted in a shift in the persuasive dynamic on the Court.

Friedman’s book thus raises the question of the relative import of different mechanisms of the Court’s maintaining itself within what the public supports (or tolerates): internal deliberations or the external influences created by the episodic appointment process. In *Lawrence*, for example, the opinion for the Court was written by Anthony Kennedy (who replaced Lewis Powell, who had voted the other

³⁷ In *Graham v. Florida*, the Court stated:

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. . . . This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (citations omitted) (internal quotation marks omitted); see *infra* note 63.

³⁸ See FRIEDMAN, *supra* note 9, at 286–88.

³⁹ 539 U.S. 558 (2003), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁰ 478 U.S. 186 (1986) (upholding a Georgia law criminalizing sodomy), *overruled by Lawrence*, 539 U.S. 558.

⁴¹ See *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 898–99 (1990) (O’Connor, J., concurring in part); *id.* at 908 (Blackmun, J., dissenting) (accusing the majority of departing from settled doctrine). The Court that decided this case in 1990 included several members who were not on the Court when it had decided *Sherbert v. Verner*, 374 U.S. 398 (1963), whose doctrine was generally displaced by *Employment Division v. Smith*. See *supra* p. 413.

⁴² *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (upholding a revised death penalty scheme allowing juries to impose the death penalty within certain prescribed guidelines).

way in *Bowers*); the majority also included Ruth Bader Ginsburg (who replaced Byron White, who had written the opinion for the Court in *Bowers*). But how much of a role the appointment process plays as compared to shifts in view by an individual justice in response to public opinion remains difficult to evaluate.⁴³ Whatever may have motivated Owen Roberts in the so-called “switch in time that saved nine,” the New Deal understanding of federal power under the Commerce Clause could not have been consolidated and extended as it was in the absence of the several retirements and replacements that occurred between 1937 and the decision in *Wickard v. Filburn*.⁴⁴

II. JUDICIAL INDEPENDENCE, PUBLIC OPINION AND INTERPRETATION

Friedman puts a great question in his book, concerning the “capacity the justices have to act independently of the public’s views”: In other words, he asks, do the justices have *sufficient* capacity for truly independent judgment?⁴⁵ As he suggests, this is at least as important a question as whether the Court is “too” countermajoritarian. These questions go to the core of the dilemma of the role of a constitutional court in a democracy. In some cases constitution framers, in moments of insight, altruism or long term understanding of self interest, might want to have courts that can make decisions independently of majoritarian sentiment, even if it is to some extent enduring; think of the multi-year national episodes of xenophobia, such as the period of the Palmer Raids after World War I, or of the internment of Japanese-American citizens, upheld in *Korematsu v. United States*,⁴⁶ during World War II. In other cases, constitutional designers might want courts to be open to popular influence in understanding changing economies, changing technologies, or problems relevant to the scope of govern-

⁴³ When the Court apparently changes direction without explicit overruling, there will often be disagreement on whether or not the factors claimed to account for the shift are “legally relevant.” Even when prior cases are overruled, there will be disagreement over whether the prior decisions should be regarded as correct statements of the law. In order to be able to account for a change, one must consider the possibility that “legal” as well as “attitudinal” or “strategic” factors play a role, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 748 (2000) (explaining that judges look to current understandings of the law under the “legal” model, whereas under the “attitudinal” model they simply follow their own ideological preferences), and it may be difficult to get sufficient agreement on what are the legally relevant factors to reliably (in a statistical sense) test other hypotheses.

⁴⁴ 317 U.S. 111 (1942); see JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 519–29 (2010).

⁴⁵ FRIEDMAN, *supra* note 9, at 373.

⁴⁶ 323 U.S. 214 (1944).

ment power to address contemporary problems. Of course, a difficulty is that the people might well disagree about what kinds of cases fall into which categories; debt relief legislation might be viewed by creditors as an attack on vested and important individual rights, and by debtors as a necessary governmental response to urgent conditions.⁴⁷

The idea that one would want courts to be independent of majoritarian sentiment might simply reflect an aspiration to impartiality in the decision of particular cases;⁴⁸ whatever the legal rule is, the court should apply it without regard to the popularity or likeability of the plaintiff or defendant. But in a constitutional democracy, the court's independence is intended also to serve the important function of providing an impartial tribunal to stand between peoples and governments, to act as a check on the abuse of government power—which requires a special form of impartiality, given that judges are generally paid by their governments. In this sense, one might see the aspiration for independence of the courts as reflecting a commitment to the importance of constitutional principle.

Friedman makes the intriguing suggestion that the Court is independent because the public wants it to be, because the public “grants” that independence to the Court.⁴⁹ “[D]iffuse support is the measure of the slack the Court has to go its own way on some issues. . . . Perhaps nobody really wants a Supreme Court that simply panders to majority opinion. Maybe people figure that [they could be a minority some day].”⁵⁰ On this formulation, the Court's independence depends on the presence of a competitive system in which current power holders may become losers; if a very stable majority believes it will always be a majority it will want a subordinate Court.

But while Friedman may be right about the preconditions for public support for judicial independence, this does not necessarily exhaust the reasons to value judicial independence—reasons that go beyond the positive account grounded in a competitive political environment. Friedman argues that judicial review is normatively valua-

⁴⁷ Compare *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding state debtor relief legislation claimed to impair mortgage contracts in violation of the Constitution in light of the nature of current emergency), with *id.* at 448–49 (Sutherland, J., dissenting) (arguing that the Constitution's meaning does not change and that the legislation impairs the validity of contracts).

⁴⁸ Cf. Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 227, 230–31 (Stephen Burbank & Barry Friedman eds., 2002) (developing the distinction between impartiality as to cases and impartiality as to correct rule).

⁴⁹ FRIEDMAN, *supra* note 9, at 379.

⁵⁰ *Id.*

ble because: (a) it acts as a prod to public deliberation over important questions, through a dialogic process, notably including judicial “stickiness”; and (b) thereby, over the long run, assists in developing the Constitution’s meaning in accord with the enduring or long-term will of the people.⁵¹ To the extent that this is a claim about the necessity of connecting judicial discourse about the Constitution with the developing views of the democratic people, it would find considerable support not only in the U.S. literature but also in Europe.⁵² In a recent book, for example, a European constitutionalist, Victor Ferreres Comella, agrees with Friedman on the importance of dialogue. Ferreres Comella argues for both the accessibility of constitutional court decisions to the people and of their gaining the attention of the people. He insists that constitutional values are, in important part, the moral consensus of a community, so courts are interpreting and implementing principles which are themselves rooted in the decisions of the people. And he is in agreement on the importance of democratic responses—amendment, appointment, interpretive adjustment—to the legitimacy of judicial review.⁵³

But for Ferreres Comella, these are not necessarily the primary or only justifications for judicial review; a second set of justifications, important in both the U.S. and Europe, are quite different. Like Dworkin, Eisgruber, Fiss, and Sager,⁵⁴ Ferreres Comella sees courts as forums of principle or impartiality, and sees judges as more likely to get right answers to questions of constitutional principle than legislatures. Ferreres Comella makes this argument, suggesting that courts have the time, the mandate, and institutional interest to focus on constitutional values, and a greater capacity for ethical and principled decision making than do legislatures or executives.⁵⁵ Such arguments about courts are, in my view, ultimately premised on the belief that

⁵¹ *Id.* at 382-84.

⁵² *See, e.g.*, VICTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* (2009).

⁵³ *See id.* at 96-107.

⁵⁴ *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE*, at viii (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 2 (1985); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 3 (2001); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 199-201 (2004); *see also* Owen Fiss, *Between Supremacy and Exclusivity*, 57 *SYRACUSE L. REV.* 187, 203 (2007) (explaining the Court’s “special competence to arrive at a correct interpretation” of the Constitution, derived from limitations on judicial power “that commit the judiciary to what might be called public reason,” including an obligation to hear both sides of disputes it will resolve); Lawrence G. Sager, *Courting Disaster*, 73 *FORDHAM L. REV.* 1361, 1370-71 (2005) (emphasizing courts’ greater capacity for impartiality and their “epistemic discipline of coherence”).

⁵⁵ *See* FERRERES COMELLA, *supra* note 52, at 32-34.

there are right answers, or better answers, or (at least) less wrong answers, to questions arising under constitutional principles. These right answers (or less wrong answers) exist, to at least some extent, *apart* from the vagaries of public opinion. Courts are there, in part, to help provide right answers to questions of constitutional values, which overlap with questions of political morality.⁵⁶

This idea of the possibility of right answers as a matter of constitutional principle could be reframed as one about the need to avoid clearly wrong answers on matters of constitutional principle. Despite faith in democratic processes, it is hard to sustain the view that democratic processes do not at times reach quite stable but wrong answers in terms of constitutional principle and morality.⁵⁷ And it is hard to avoid the conclusion that one of the normative functions of independent courts is to try to resist the dramatically wrong answers at which democratic polities sometimes arrive.

The possibility of identifiably wrong constitutional answers leads me to my final comments, designed to supplement Friedman's argument towards a theory of legitimate constitutional interpretation. Friedman's argument in this book depends on the stickiness and slowness of the Court's procedures and process of change,⁵⁸ together with the dialogue that they can create, that, for him, constitute the uniquely self-legitimizing features of judicial review in the American democracy. It is, ultimately, a democratic grounding—albeit a form of more deliberative democracy.

⁵⁶ For arguments for why courts can do this better than legislatures, see *id.*, noting the judiciary's political insulation, unique function, and reasoned decision-making processes. *But see* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230–32 (2006); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 2 (1999); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1508 (2007) (“[L]egislators plausibly have better information than judges about the factual components and causal consequences of their constitutional decisions.”); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1379–80 (2006) (emphasizing moral capacities of legislators); *cf.* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, at x (1999) (emphasizing the harms of judicial review).

⁵⁷ Friedman at one point says that “everything important happens” after decisions—maybe so with respect to “alignment with popular opinion,” FRIEDMAN, *supra* note 9, at 382–83, but surely not “everything important.” Surely some important things happen at the time of the judgment. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 219 (1944) (affirming the government's exclusion of citizens of Japanese ancestry from the West Coast and the criminal conviction of the petitioner for defying the exclusion orders).

⁵⁸ *Cf.* Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 414 (discussing benefits of the “slower law” that emerges from courts and opposing change in tenure of Supreme Court justices).

A constitution typically must find justification in both democratic consent or accountability and in good or just principles. To attract adherence as a special form of law, constitutions often are associated with assertions of general, admirable, and (even) universalizable principles. True, one could conceive of a constitution as solely an operating system for governance, defining the election units and periods and allocating powers to government entities; and there are effective constitutions in the world that lean heavily towards the operating rules version with relatively small efforts to constrain democratic decision making through articulated “rights,” as in Australia. But if not seen as embodying implicit commitments to good and just principles, beyond majority rule, it may be difficult—in a working and pluralistic democracy—for such a constitution to sustain itself over time. Interpretive questions will arise even about the simple operating rules; without resort to more general principles that can attract wide agreement to resolve these questions, the stability of the system will be threatened. So, constitutions, to be successful in acting as a fundamental law that normatively constrains government actors, must include (at least implicitly) some commitments to “principles” beyond simply the operating rules of a particular governance system.

What this means, I think, is that, at least on some issues and at some levels, some degree of countermajoritarian “difficulty” cannot be entirely dissolved by ongoing democratic dialogue and accountability. Even if one might argue that in a thin, operating system kind of constitution the only “value” is that of democracy, issues will arise that challenge the more general values implicit in this, whether those be of human equality, or of protection of minority interests through election units or other means.⁵⁹ There is thus a continuing tension between democracy (whether understood simply as majority rule or as any other operating rule) and principle; in that tension and its ongoing working out lies the promise, and challenge, of constitutionalism.

Democratic accountability, participation, and dialogue are necessary, then, but not sufficient, to legitimate a constitution and its en-

⁵⁹ To the extent interpretive questions arise, an effort to interpret a constitutional provision in light of such a value may entail the possibility of conflict between what is claimed to be a narrow or “literal” application of the constitutional provision as a “rule,” or an alternative reading based on a different or deeper understanding of the relevant constitutional value (including democracy). Moreover, democracy as a value may be indeterminate on some issues: In a federal system, for example, issues about the allocation of powers routinely can be seen to pit sub-national majorities against national majorities, in a setting in which the principle of democracy by itself does not provide guidance on which majority should control.

forcement mechanisms of judicial review. Friedman suggests that diffuse support for courts corresponds to the amount of “slack” courts have.⁶⁰ Let me suggest that what political scientists call “diffuse” support⁶¹ might correspond to something else that we could call a commitment to being governed by principles, including the principle of independent courts to apply those principles. So my first claim here is that constitutionalism—and constitutions that aim to create or sustain the conditions of constitutionalism—must rest on sufficiently good principles in addition to those of democracy and consent.

I turn now to a second set of normative questions, concerning the implications of Friedman’s book for the practice of interpretation. I worry that this brilliant book may be misused to argue either that 1) the “will of the people” ought to be viewed as controlling constitutional meaning in some narrow, time-limited sense; and/or 2) that it is only American views and experience that matter in interpreting the U.S. Constitution. Should the Court now treat public opinion as an independent source, like text, or original understandings, that should be considered as such in deciding constitutional cases? Should it exclude everything that is not “American” experience and opinion from its ongoing evaluation of constitutional meaning?

As I said at the outset, this book ought to be understood to exclude interpretive moves, such as that in *Boerne*, that seek essentially to ignore the constitutional views of the public or its legislature. One can even remain a “judicial supremacist” without thinking it sensible to exclude from efforts to best understand constitutional meaning the views of the Congress. But at the same time, the adjudicative process would *not* be improved if the Court were to treat public opinion as a new, independent interpretive source, for at least three reasons.

First, the effect of public opinion is both pervasive and subtle; to explicitly treat it as a separate factor would entail some double-

⁶⁰ See FRIEDMAN, *supra* note 9, at 379.

⁶¹ Diffuse support is often distinguished from specific support. See, e.g., WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS 10 (1973) (defining “diffuse support” as a generalized attachment, while specific support “refer[s] to the critical or favorable reactions to what the Court or individual justices have recently done”); see also James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 537 (2003) (explaining “diffuse support” as equivalent to “legitimacy,” a form of “institutional loyalty” not dependent on the “immediate outputs” of the Court); cf. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635–37 (1992) (distinguishing diffuse support among the general public, which is in practice unrelated to specific outputs, and diffuse support among opinion leaders, whose support for the Court is linked to more specific policy preferences).

counting. As Bryce's quotation above suggests, its most important impacts may be subconscious. Second, taken as a source like "text" or "precedent," a "public opinion" factor is likely to give too much effect to views that may not be enduringly reflective of considered public will. That is, it may reflect temporary preferences of those in power or those who are polled. Third, doing so has the potential to make more difficult the task of treating the Constitution as a principled instrument, designed to embody claims to justice and fairness that inspire and deserve respect as fundamental law.

Although I agree with Friedman that to view constitutional law as entirely separate from politics is both unrealistic and normatively undesirable, since the constitutional values being enforced must be connected to the polity, at the same time what the Court does should be, and should be seen to be, about law. Law is connected to legal texts, to past precedents, to past, as well as present, understandings. Given my reading of Friedman's position, which places much more weight on large-scale shifts in views and understandings over time than on the year-to-year or even decade-to-decade shifts in popular attention, conventional tools of analysis should continue to drive interpretive analyses of the Court. These conventional tools include text, precedent, original understandings, history, structure and purpose, values, and consequences.⁶²

No new theory of constitutional interpretation is required to take account of the insights of this book. Conventional sources—including legal understandings of the purpose of constitutional provisions, and of constitutional values, as well as of the consequences of different interpretations—can at times be meaningfully informed by understanding what the democratic polity thinks and how it will react. This does not mean that "prudential" considerations ought to drive constitutional interpretation, but that in understanding the consequences of a decision it is important to take into account the reactions of public officials and the public as a whole, over time. The Constitution is about creating a working government, and a government charter enforced without regard to consequences is not likely to survive long. In some areas, the doctrine itself permits the principled consideration of large-scale and enduring public views (as in the

⁶² See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPAC L. REV. 599 (2008); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

Eighth Amendment's doctrinal attention to "evolving standards of decency").⁶³ In other areas, public views may have much less of a legitimate role to play (consider the protection of unpopular minority religions).

Turning to the role of foreign law or experience, conventional interpretive analysis of the Constitution has long included—and increasingly will and should include—awareness of comparisons with other countries, comparisons that may assist in the clarification of what U.S. constitutional values are (whether similar or different) and that may cast light on the consequences of different interpretive choices.⁶⁴ Friedman's book contributes to our understanding of how perceptions of the international context have long influenced domestic constitutional understandings.⁶⁵ He argues that in the crisis of 1937, F.D.R.'s Court-packing plan fell on a country at a time of increased concern about totalitarianism, a concern arising out of awareness of events in Europe; he notes members of Congress accusing Roosevelt of seeking the powers of a Hitler or Mussolini in trying to weaken the Court's role as a bulwark of liberty.⁶⁶ The international context afforded a comparative mirror through which to evaluate the implications of Roosevelt's proposal, in light of the U.S. commitment to the principles of judicial independence and liberty.

Today, there are more relevant comparative law materials that are more accessible than they were in the 1930s, and it is increasingly important that the constitutional democracies of the world be aware of the constitutional experience of other countries. The United States government sometimes acts as though the people of the United States as a country have a stake in the internal constitutional decisions of other countries, recently demonstrated, for example, with respect to Honduras.⁶⁷ And other countries sometimes behave as

⁶³ *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion))).

⁶⁴ See VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 103–59 (2010); see also *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (describing how other countries' "experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem" and arguing that European federalisms do not support the anti-commandeering rule adopted by majority); Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Address to the International Academy of Comparative Law (July 30, 2010), available at http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_08-02-10.html.

⁶⁵ See FRIEDMAN, *supra* note 9, at 218–20.

⁶⁶ *Id.*

⁶⁷ See, e.g., Press Release, White House Office of the Press Sec'y, Remarks by President Obama and President Uribe of Colombia in Joint Press Availability (June 29, 2009), available

though they have a stake in our constitutional rulings, even when their own nationals are not involved, as in filings by the E.U. in U.S. death penalty cases.⁶⁸ As the world in which we live becomes more permeable and more mobile, the constitutional democracies of the world do have stakes in the success of others in sustaining democratic constitutionalism, and in the decisions of courts—and legislatures—that contribute to that goal.⁶⁹

at http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-President-Uribe-of-Colombia-in-Joint-Press-Availability/ (remarks by President Obama) (referring to the coup in Honduras and stating that the “coup was not legal and that President Zelaya remains the President of Honduras”); Editorial, *A Way Out in Honduras*, L.A. TIMES, July 14, 2009, at A18 (reporting that President Obama called the recent actions of the Honduras government illegal and paused U.S. aid to that country). Honduras’ actions were, at least in part, arguably in conformity with a decision of its own Supreme Court, however, and the question of their constitutionality under the Honduras constitution has been hotly debated. Compare Doug Cassel, *Honduras: Coup d’Etat in Constitutional Clothing?*, ASIL INSIGHT, July 29, 2009, available at <http://www.asil.org/files/insight090729pdf.pdf> (arguing that the action of the Congress in removing Zelaya from office was plainly unlawful) with Frank M. Walsh, *The Honduran Constitution Is Not a Suicide Pact: The Legality of Honduran President Manuel Zelaya’s Removal*, 38 GA. J. INT’L & COMP. L. 339, 364–66 (2010) (arguing that because a prior amendment had inadvertently removed provisions for an impeachment procedure, the actions of the Congress were in accord with the spirit of the Constitution, given the threat the President posed to the constitutional order and the rule of law by his defiance of court orders and efforts to circumvent unamendable provisions of the Constitution).

- 68 See Brief for the European Union as Amicus Curiae Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), cited in *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). In its Statement of Interest, the EU wrote:

Like the United States, the European Union (“EU”) is founded on principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law. These principles are common to its fifteen member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

Id. at 1. The brief continued:

The EU and its member states are opposed to the death penalty in all cases and accordingly aim at its universal abolition. The abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. This view has been expressed to the government of the United States through various general demarches and through specific demarches in cases involving, *inter alia*, the pending execution of persons with mental retardation. The EU and its member states pursue this policy consistently in different international fora such as the United Nations and the Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty. . . . The EU provides a special and unique perspective to this Court that is not available through the views of the parties or other amici.

Id. at 1–2 (citing *Guidelines to EU Policy Towards Third Countries on the Death Penalty*, EUR. UNION (June 3, 1998) available at www.eurunion.org/legilat/DeathPenalty/Guidelines.htm).

- 69 See JACKSON, *supra* note 64, at 120, 130–31 (noting the interdependent relationships of nations to one another in international law and in sustaining democratic constitutionalism).

Both the “will of the people” and the judgments of the Court on the important values of the Constitution are inevitably influenced, positively and negatively, by our understandings of the practices and views of other nations—both those we regard as examples of what we do not want to be and those we regard as similarly committed to the ideals of liberal constitutional democracy. Friedman’s book illustrates this international context in the 1930s, and, as I and others have described, it is a factor throughout American constitutional history.⁷⁰ But, like “public opinion,” foreign law and experience are not necessarily “independent” factors or sources of law but rather may help judges—and the American public—decide what they believe are the consequences of alternative interpretations, or what controlling U.S. constitutional values are on a matter, or on the utility of different doctrinal approaches to similar problems.

In contrast to the Court’s defensive assertions of legal autonomy—from the U.S. Congress (and the public it represents) and from foreign experience—in the late 1990s, Friedman’s book may be taken as an eloquent proof that the Court should not fear, but embrace, knowledge and understanding of the contemporary world.

III. AMENDOPHOBIA, ARTICLE V AND THE “WILL OF THE PEOPLE”

One of the particularly noteworthy claims in this book is Friedman’s argument that in 1937, “we the people” agreed that the Constitution could be amended through interpretation, rather than having to resort to the Article V process: “The true significance of 1937 . . . was plain for all to see. The American people signaled their acceptance of judicial review as the proper way to alter the meaning of the Constitution, but only so long as the justices’ decisions remained within the mainstream of popular understanding.”⁷¹ Friedman’s claim about the meaning of the events of 1937, including whether they marked a departure from prior periods, could be contested,⁷² but he is undoubtedly correct that these events manifested a

⁷⁰ See e.g., *id.* at 103–14; Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006).

⁷¹ FRIEDMAN, *supra* note 9, at 196.

⁷² To note just a couple of questions about Friedman’s claim: The force of Friedman’s claim depends in part on whether the 1937 cases represented an “alter[ation]” or amendment to the Constitution, that is, what was being changed was “the Constitution” rather than the Court’s erroneous interpretations of the Constitution. The suggestion that whenever the Court overrules its own earlier decisions the Constitution has been amended depends on a contestable merger of the jurisprudence with the Constitution it-

significant public tolerance of change in doctrine by the Supreme Court.

But one of the remarkable features of the history to which Friedman draws attention is the undoubtedly diminished role of formal amendment in the constitutional conversation of that time and in many of the decades since. The near invisibility of the amendment process in Friedman's book—the relatively slight attention given, for example, to the Nineteenth Amendment, the Civil War Amendments, or to the Sixteenth and Seventeenth Amendments—is perhaps understandable because, as Friedman shows, interpretation has played so important a role in the process of constitutional change and adjustment and because his book is, after all, focused on the Supreme Court and public opinion. Indeed, Friedman's book may be read as a powerful account of how, as a historical matter, interpretation has come to supplant amendment as the method of choice for constitutional contest and change: the apparent responsiveness of the Court to elected officials and public views may have persuaded many that formal amendment is not necessary.

The history told here thus may reinforce a normative disposition to oppose or discount the possibility of amendments of the Constitution even when considerable numbers of the people believe an important change is required. Take, for example, *Citizens United*.⁷³ In that case the Court, 5-4, overruled two earlier decisions to hold that Congress lacked power to prohibit or limit the independent expenditures of corporations made on behalf of political candidates. The two decisions overruled were *Austin v. Michigan Chamber of Commerce*,⁷⁴ decided in 1990, and *McConnell v. Federal Election Commission*,⁷⁵ decided

self. Moreover, in the period after 1937, resort to the amendment process remained an apparent possibility both in actions in the Congress (some of which led to Amendments XXII, XXIII, XXIV, XXV, and XXVI), and in efforts by state courts and legislatures to procure amendments in response to Warren Court decisions in the 1950s and 1960s. See generally Ross, *supra* note 16, at 484, 528–52 (describing three proposed amendments sponsored by states' rights proponents). The failure of the Court-packing plan, furthermore, has been explained by some as being in part a rejection of Roosevelt's perceived high-handedness or as reflecting fear of an American dictatorship, rather than Court veneration or an embrace of a particular role of the Court. See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 503 (2010).

⁷³ 130 S. Ct. 876 (2010).

⁷⁴ 494 U.S. 652, 666, 668 (1990) (upholding section 54(1) of the Michigan Campaign Finance Act, which restricts corporations from using general treasury funds for independent expenditures in connection with state candidate elections, against First Amendment and Equal Protection Clause challenges).

⁷⁵ 540 U.S. 93, 203–09 (2003) (upholding section 203 of The Bipartisan Campaign Reform Act of 2002 (BRCA) and its extension of restrictions on corporate independent expenditures in connection with federal elections to include all "electioneering contributions").

only seven years earlier in 2003. The *Citizens United* decision has occasioned considerable controversy, and public opinion polling suggests that between 60% and 80% of voters disapproved the decision and favored limits on campaign expenditures by corporate entities.⁷⁶ One might have thought that with this level of disapproval, on a recent decision that overruled previously settled law, a constitutional amendment would at least be considered as a response. Although some members of Congress have sponsored or proposed constitutional amendments,⁷⁷ the weight of the effort by those who disagree with the decision has been in other directions.⁷⁸ Although some NGOs have raised amendment as a possible avenue to explore,⁷⁹ oth-

⁷⁶ See Monica Youn, *Citizens United: The Aftermath*, AM. CONST. SOC'Y, 1–2 (June 2010), <http://www.acslaw.org/pdf/C21/Issue%20Briefs/ACS%20Issue%20Brief%20-%20Youn%20Citizens%20United.pdf> (describing results of polls by Washington Post-ABC News, Pew, Common Cause, and People for the American Way, taken a month or so after the Court's decision). Of the two polls that broke down responses by political affiliation, a clear majority of both Democrats and Republicans opposed the decision, with opposition highest among those who describe themselves as independents. See *id.* A poll by People for the American Way found “78% believed that corporations should be limited in how much they can spend to influence elections, and 70% believed corporations already have too much influence over elections.” *Id.* at 1.

⁷⁷ See, e.g., H.R.J. Res. 74, 111th Cong. (2010) (proposing a constitutional amendment permitting Congress and the States to regulate “expenditure of funds by corporations engaging in political speech,” introduced by Congresswoman Donna Edwards of Maryland, with twenty-five cosponsors); Press Release, Senator Max Baucus, Baucus Statement on Campaign Finance Ruling (Oct. 18, 2010), available at http://baucus.senate.gov/?p=press_release&id=222 (describing Senator Baucus' proposed constitutional amendment to authorize regulation of corporate and union campaign contributions and expenditures). For an earlier proposal by Senator Charles Schumer, with bipartisan cosponsorship, see S.J. Res. 21, 110th Cong. (2007), proposing a constitutional amendment authorizing Congress and the States to “regulate the raising and spending of money, including through setting limits” for elections and, in the case of states, referenda, initiatives and similar ballot measures.

⁷⁸ See e.g., Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010); Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), S. 3295, 111th Cong. (2010); Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010); Fair Elections Now Act, H.R. 1826, 111th Cong. (2009); see also Ciara Torres-Spelliscy, *Citizens United: Waking a Sleeping Giant*, BUS. ETHICS, (Oct. 21, 2010), <http://business-ethics.com/2010/10/21/1304-citizens-united-waking-a-sleeping-giant>. But cf. PEOPLE FOR AM. WAY, <http://www.pfaw.org/> (last visited Nov. 14, 2010) (urging support for the “DISCLOSE” Act, a proposed statute to require disclosure of corporate campaign spending, while also urging support for a constitutional amendment). For proposals for a new constitutional convention, see CALL CONVENTION, <http://www.callaconvention.org/> (last visited Nov. 14, 2010) (promoting a constitutional convention from which legislators are excluded and referring specifically to the need for campaign finance reform).

⁷⁹ See, e.g., FREE SPEECH FOR PEOPLE, www.freespeechforpeople.org (last visited Nov. 14, 2010) (advocating a constitutional amendment in response to *Citizens United*); PLEDGE TO PROTECT AM.'S DEMOCRACY, <http://www.pledgefordemocracy.org> (last visited Nov. 14, 2010) (website established by People for the American Way and Public Citizen) (seeking

ers seem to avoid it conspicuously. For example, a recent paper, written by a senior counsel for campaign finance to the Brennan Center's Democracy Project, explains why the decision is an incorrect reading of the First Amendment and what the adverse consequences of the decision could be for the quality of American democracy. It recommends a three-fold strategy to overcome its effects: a focus on new interpretive approaches, a focus on various forms of new legislation (including public campaign finance), and work on judicial appointments.⁸⁰ Nowhere in this thoughtful paper, however, is the possibility of constitutional amendment even broached.

This kind of silence about amendment is symptomatic of what I would term a fear of constitutional amendments, an "amendophobia," especially on the left. Fifteen years ago, after the Republican victories in the midterm 1994 elections led to a spate of proposed constitutional amendments being introduced or considered in the Congress, Kathleen Sullivan wrote a paper about what she called "amendmentitis"—a propensity, as she described it, to rush to constitutional amendment to solve problems that could be addressed legislatively or (worse) should not be addressed by law, and especially not entrenched law.⁸¹ She identified five reasons to operate on a presumption against amending the constitution: constitutional stability, the rule of law, constitutional coherence, the benefits of constitutional generality, and preserving the role of the Supreme Court.⁸² Many

pledges to support a constitutional amendment to overturn holdings that corporations have the same First Amendment rights as citizens).

80 See Youn, *supra* note 76, at 9–18 (emphasizing need to build legal records to meet "compelling interest" test, to develop interpretive approaches focused on voters, and to enact new legislation to provide disclosure and advance public financing); *id.* at 20 (emphasizing importance of new judges with conception of the First Amendment different from that of the Roberts Court majority).

81 See *supra* note 10; see also Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1354–59 (1990).

82 See generally Sullivan, *Constitutional Amendmentitis*, *supra* note 10. Sullivan's points about stability seem spot on: If a constitution is to serve as a basic framework for an ongoing legal system, and especially if it is to serve as an object of affection and loyalty, it must be seen as an enduring document. But while the rule of law might be threatened by too many changes in law too fast, it is not clear why the rule of law is less threatened by change through litigation and interpretation than by change through formal amendment; indeed, since Article V specifies in writing the amendment procedure, one might think that, along traditional rule of law conceptions, change by amendment would be preferred.

Sullivan's argument from coherence—that the Constitution was conceived as a whole, such that changes in one part may affect others—raises a good caution, but overall seems less persuasive as a reason not to amend. First, it may be based on an overstatement of the degree of coherence in the original document. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1285–306 (1999) (discussing

of the arguments have considerable force: Very frequent amendment of a constitution may detract from its overall stability and the habits of the rule of law (which are closely related to the interests in stability), and could undermine the Supreme Court's role in protecting individual rights and liberties.

Too frequent amendment (or too many highly specific amendments) might also diminish the force of the Constitution itself as a "symbol" of the nation and its commitments to constitutional democracy, as argued by a bipartisan group put together by the Constitution Project and the Twentieth Century Fund to establish proposed guidelines for the kinds of issues that should be dealt with by amendment, rather than by legislation.⁸³ This bipartisan committee took the view that, because constitutional amendments bind future generations, which generally should be able to re-examine contested policies in light of future experience, restraint is appropriate; the Prohibition Amendment is in their view a paradigm of an imprudent and inappropriate amendment.⁸⁴ On campaign finance, however, one might

"bricolage" in constitution-drafting and its implications for coherence-based interpretive approaches). Second, it ignores the effects of intervening amendments that changed prior structures or relationships in dramatic ways. See, e.g., U.S. CONST. amend. XIV; U.S. CONST. amend. XVII. Professor Sullivan's argument on coherence grounds against a balanced budget amendment seemed particularly subject to question, since Congress's modern authority to tax arguably derives in important part from the Sixteenth Amendment, adopted long after the original Constitution.

Embedded within Sullivan's argument on coherence is a different one, particularly concerned with the Bill of Rights. Sullivan, *Constitutional Constancy*, *supra* note 10, at 699-700. Is it particularly important not to encourage amendments to the Bill of Rights? This argument gives one real pause. To the extent that a bill of rights is intended to protect those who are unpopular, there is good reason to make their amendment difficult. Cf. S. AFR. CONST., 1996, art. 74(2) (establishing a somewhat more rigorous procedure to amend the Bill of Rights chapter than for some other kinds of amendment). But even if this argument provides a good reason for a presumption against amending the Bill of Rights in response to Court decisions, it surely does not support an absolute bar.

Sullivan is also right, I think, that if the Constitution is too easily or often amended, the role of the Court in protecting its values accordingly diminishes. However, Sullivan's objections generally do not help discriminate between amendments that ought to be pursued and those that should not. They can be understood to support an important precautionary principle that the effects of an amendment across the Constitution must be considered before an amending process is undertaken.

⁸³ See CITIZENS FOR THE CONSTITUTION, "GREAT AND EXTRAORDINARY OCCASIONS": DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 4-5 (1999) (arguing that amending the Constitution too often or with "the detailed specificity of an ordinary statute" would decrease the document's symbolic importance); cf. Michelman, *supra* note 81, at 1362-64 (advancing the "idea that the Constitution is in some sense a picture of 'us'").

⁸⁴ See CITIZENS FOR THE CONSTITUTION, *supra* note 83, at 3-4. Their report also suggests that a proposed campaign finance amendment of the 1990s should be seen merely as a "response to contemporary political pressures" and not about an "enduring" problem. *Id.* at 11. Yet two generations have come of age between 1976, when *Buckley* was decided, and

look at the Court's decisions since *Buckley v. Valeo*,⁸⁵ in 1976, as "binding future" generations to a highly contested understanding of constitutional meaning on a point of real moment. The Prohibition Amendment, moreover, established a directive rule on an issue of social policy, prohibiting the manufacture or distribution of intoxicating beverages; an amendment that overcomes a Court decision in order to empower (but not require) governments to regulate electioneering by corporations would not prohibit or mandate a particular course of action.⁸⁶

The idea that amendment should not be the first response to a decision with which one disagrees seems quite sound, especially in a complex democracy with a deeply entrenched constitution. However, the fact that very frequent amendments will have negative consequences does not address the question of whether an occasional amendment will have such consequences. And the terms of amending the U.S. Constitution are so difficult that—at least if history is a good predictor—there may be greater risks of too infrequent, than of too frequent, amendment. To suggest that too much or too easy amendment is a bad thing does not imply that the Constitution should never be amended nor even give that much guidance on when it should and should not be. Politically eschewing amendment may cede an important democratic tool, manifesting a fear of the people and of democratic self-government that in the long run may

2010, when *Citizens United* was, and the problems of expense and influence in campaign spending have certainly not diminished in that time. Rounds of congressional legislation—no easy matter to achieve—involving efforts to regulate campaign spending have been repeatedly rebuffed by the Court on constitutional grounds. Whether statutory means have been exhausted is not clear, but the efficacy of alternative forms of regulation that would survive constitutional scrutiny under prevailing standards is also unclear.

85 424 U.S. 1 (1976) (per curiam) (striking down campaign expenditure limits of the Federal Elections Campaign Act of 1971 [FECA]); see *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (holding restrictions on independent corporate treasury expenditures unconstitutional); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456 (2007) (holding electioneering limits of McCain-Feingold law unconstitutional as applied to speech other than "express advocacy"); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (holding provisions of the FECA unconstitutional as applied to nonprofit advocacy group's speech).

86 Cf. CITIZENS FOR THE CONSTITUTION, *supra* note 83, at 12–13 (distinguishing between power granting amendments "necessary . . . [to] eliminate constitutional barriers" to legislation and amendments that "restrict the scope of democratic participation by future generations"). On this account, an amendment authorizing regulation may be seen in important respects to enhance the democratic character of the Constitution—assuming that there are adequate checks on such a power not being used for incumbency protection or otherwise abused.

be self-defeating.⁸⁷ For Friedman's book also might be read to suggest that, whether progressive or conservative, results on divisive issues in constitutional law cannot in the long run be sustained without political support.

Many Americans take pride in the longevity of their Constitution, viewing the Framers as having brought wisdom and public-spiritedness towards its creation. Most Americans understand that if the courts have concluded that something is a matter of right, that conclusion must be respected, without necessarily agreeing that rights exist only through judicial recognition.⁸⁸ The Constitution was designed to be difficult to amend; many believe that difficulty has contributed to the stability and (relative) continuity of our constitutional democracy and to the influence of and respect for Supreme Court decisions as representing the law to which obedience is owed.

But admiration and affection for a constitution can become a disabling, disempowering form of perfectionism, a belief that instead of being a product produced by imperfect humans, the text should be regarded as a sacred vessel that should not be tampered with by the mere mortals of the present age.⁸⁹ Respect for the Supreme Court, which is essential to securing compliance with its judgments and to enabling the Court to play a settlement function in limiting the

87 See Michelman, *supra* note 81, at 1359 (expressing concern that opposition to any amendment of the Constitution may "connive with a terribly sad constitutional fate. . . . [helping to] make our political world . . . all distrust and no democracy").

88 "I got my rights!" is a phrase that might represent an assertion of popular understanding and authority.

89 Cf. SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-17 (1988) (discussing the Constitution as a "sacred object"); Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 791-92 (1992) (arguing that the failure to debate the value of the Constitution has had negative effects); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE PORTABLE THOMAS JEFFERSON 557-58 (M. Peterson ed., 1975) (suggesting that every twenty years or so the Constitution should be amended). In this letter, Jefferson also expressed the following view:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind.

Id. at 558-59.

points of continuing and divisive controversy,⁹⁰ can nonetheless pass the point of being healthy in a democracy.

Much of the academic literature assumes the primacy of the Supreme Court and focuses on critique or explanation of its decisions with a view to preserving or reforming its doctrine. Other scholars criticize the primacy of the Court, but in radical terms—"taking the Constitution away" from the Court, or other arguments to prevent the Court from reviewing the constitutionality of legislation—that do not engage with questions of stability and amendment, perhaps because they are prepared to jettison a much larger part of our ongoing system.⁹¹ For those who do not seek to abolish judicial review, but believe that ruling out amendment as a response to seriously incorrect decisions is inappropriate, the hard questions are what kinds of issues warrant invocation of the amendment process.⁹² These are hard questions precisely because there is so much to the point that too many or too frequent amendments will have potentially adverse effects; and the empirical effects of more frequent amendment are untested.

Constitutional veneration should not exclude amendment. As Article V suggests, the Court was never intended to have the final word on all matters constitutional. At least five amendments have become part of the Constitution to respond to or overrule Supreme Court decisions: the Eleventh Amendment (1798), which overruled *Chisholm v. Georgia's* holding concerning the Court's jurisdiction over debt actions against states;⁹³ the Thirteenth Amendment (1865), outlawing slavery and thus responding to *Dred Scott v. Sanford's* holding that Congress lacked power to prohibit slavery by statute;⁹⁴ the Fourteenth Amendment (1868), overruling *Dred Scott's* pernicious interpretation

90 See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361 (1997). But see LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2001) (arguing that the function of judicial review is to resist or "unsettle" results achieved by the political branches of government).

91 See, e.g., TUSHNET, *supra* note 56.

92 For an effort to systematize thinking about the choice between common law adjudication or formal amendments, see generally Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 229 (Richard W. Bauman & Tsvi Kahana eds., 2006).

93 U.S. CONST. amend. XI (abrogating *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which upheld the Court's original jurisdiction in a suit on a contract by a citizen of one state against another state).

94 U.S. CONST. amend. XIII; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451–52 (1857).

of African-Americans as outside the citizenry of the United States;⁹⁵ the Sixteenth Amendment (1913), responding to the *Pollock v. Farmer's Loan & Trust Co.* decision concerning the constitutionality of a federal income tax;⁹⁶ and the Twenty-Sixth Amendment (1971) to overrule a portion of the decision in *Oregon v. Mitchell* holding that Congress lacked power to extend the vote to eighteen-year-olds in state elections.⁹⁷ The Nineteenth Amendment, moreover, rectified the constitutional status of women that had been reflected in such late-nineteenth-century decisions under the Fourteenth Amendment as *Minor v. Happersett*.⁹⁸ Has the time come for the American people once again to express their disagreement with the Court over a fundamental aspect of American constitutionalism?

Maybe so. The decision prohibiting regulation of direct corporate expenditures on behalf of, or in opposition to, particular candidates makes a significant change in the structure of American election finance law—a structure that has been in place since well before the campaign finance reforms of the 1970s. As early as 1907, Congress banned corporate political contributions to candidates.⁹⁹ In the Taft-Hartley Act of 1947, Congress extended the ban to any expenditures by corporations to cover not only direct contributions but also independent expenditures.¹⁰⁰ Such provisions—in place for more than sixty years—are now undone.

The consequences of the decision are not easy to predict; it is possible that there will not be significant change in corporate spending, but it is also possible that business corporations will take up the opportunity that the Court's ruling provides.¹⁰¹ If they do, the risks are considerable.

⁹⁵ U.S. CONST. amend. XIV; *Dred Scott*, 60 U.S. at 406–27, 454 (holding that under the Constitution, African Americans could not be considered citizens as they were excluded from the original concept of “the people”).

⁹⁶ U.S. CONST. amend. XVI; *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 586 (1895) (holding that an income tax was unconstitutional).

⁹⁷ U.S. CONST. amend. XXVI; *Oregon v. Mitchell*, 400 U.S. 112, 118, 124–30 (1970) (Black, J., announcing the judgment of the Court).

⁹⁸ See U.S. CONST. amend. XIX (stating that the right to vote shall not be denied on account of sex); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875) (rejecting a woman's constitutional claim to be entitled to vote, holding that the Constitution does not prohibit states from allowing only men to vote in elections).

⁹⁹ Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441(b) (2006)).

¹⁰⁰ Taft-Hartley Act of 1947, Pub. L. No. 80-101, §§ 304, 313, 61 Stat. 136, 159–60.

¹⁰¹ Many, though not all, commentators are of the view that the effect of *Citizens United* will be to increase the impact of corporate spending in election campaigns, including, in particular, campaigns for elected judicial office in the states. See, e.g., James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 792–93 (2010); Adam Liptak,

The use of enormous concentrations of wealth, made possible because of legal fictions designed to facilitate the accumulation of capital in a market economy, to directly influence democratic elections arguably undermines the primacy of voter equality. Markets and political democracy may reinforce each other in healthy ways; but unrestrained corporate spending to elect, or defeat, candidates for public office arguably threatens the premise of political democracy, that is, of the equal standing of each voter. The risks of allowing such corporate expenditures increases the likelihood of business interests having legislators who are “bought and paid for,” accountable primarily to business interests, rather than voters. It is already a challenge for many members of legislatures to think independently about the public interest when they must raise money from many individuals to fund their election campaigns. But although individual access to wealth varies greatly, candidates who can appeal widely to many people of ordinary income still have a shot. “Independent” corporate expenditures can be made in opposition to an incumbent candidate,¹⁰² in ways that afford opportunities for influence comparable to those created by direct donations; a threat to support an opponent may be a powerful negative incentive to an incumbent legislator. Allowing direct corporate expenditures of this sort (even if nominally “independent”) may well result in our democracy having many more legislators who feel beholden primarily to business interests.¹⁰³

Former Justice O'Connor Sees Ill in Election Finance Ruling, N.Y. TIMES, Jan. 27, 2010, at A16 (reporting Justice O'Connor's views); Richard Hasen, *Bad News for Judicial Elections*, N.Y. TIMES (Jan. 21, 2010), <http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics>. Others are somewhat less troubled. See, e.g., Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUS BLOG (Jan. 24, 2010), <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united> (stating, “I share neither the jubilant sense that the First Amendment has scored a major triumph over misbegotten censorship nor the apocalyptic sense that the Court has ushered in an era of corporate dominance that threatens to drown out the voices of all but the best-connected and to render representative democracy all but meaningless,” especially in light of experience in those states that had not restricted corporate spending in state elections; calling for improved laws on disclosure). And some praise the decision. See, e.g., Eugene Volokh, *More Messages, More Sources*, N.Y. TIMES (Jan. 21, 2010), <http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/> (praising the decision as leveling the playing field between media and other business corporations).

¹⁰² See 2 U.S.C. § 431(17)(B) (defining an expenditure as “independent” if it is “not made in concert or cooperation with or at the request or suggestion of [a] candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents”).

¹⁰³ I do not consider here the possibility, proposed by some scholars, for required anonymity in contributions. See BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 6 (2002).

Moreover, if the opportunities created by the Court's decision are fully exploited they risk a progression to a culture of corruption—legalized corruption to be sure—in American politics and business. Given corporate profits, the costs of buying elections may seem small. Is there a risk of increased expenditures on political campaigns in an escalating arms race of corporate interest (the technology industry versus agriculture, for example) to have their favored candidates in office? If so, this might enhance the impact of corporate money, to the detriment of ordinary voters and possibly to the detriment of the market economy: If businesses begin to focus more resources and attention on purchasing political power, their focus on market performance and innovation may decline.

Is it time to consider amending the Constitution to restore legislative authority to regulate (or prohibit) corporate expenditures in elections? There are, to be sure, serious risks in pursuing such a course, to be discussed below. Yet there may be countervailing reasons to at least give real consideration to an amendment as a response to *Citizens United*, in addition to or in place of some of the statutory or other measures being proposed. For it is possible that the changes that could ensue from this decision would be self-entrenching, in ways that would defeat the possibility for later political correction through ordinary lawmaking or constitutional amendments insofar as they require legislative passage. And refusing to consider amendment as one way to respond to a course of Supreme Court decisions that are believed to be incorrect on so significant a question unnecessarily removes an important democratic element of accountability from the socio-legal context of the Constitution as a whole.

First, on the possibility of self-entrenching corporate and political behaviors: If corporate spending increases in the ways permitted by this ruling, and if more legislators feel under the influence of corporate interests (at least to the extent of having to avoid having them fund their opponents), it may become increasingly difficult to find legislators willing to propose either an amendment or legislation that might pass judicial scrutiny. Legislators who have grown to fear the possibility of large corporate spending to secure their defeat at the next election are very unlikely to be willing to promote legislation or constitutional amendments that corporations disapprove of, whether in campaign spending or on matters of substantive policy. Corporate political action committees ("PACs") may have some of this potential, but the amount of funds available through corporate treasuries and the greater ease of their use raise the possibility of a much greater corporate role in elections in the future than we have at present.

And the potential for such self-entrenching effects of corporate spending—freed from regulation by the Court's decision—is a special factor favoring judicial overruling (not to be expected) or amendment, and sooner rather than later.

Second, on democracy: The Constitution represents, as most constitutions do, a balance between commitments to democracy (in the sense that the people of the polity retain the power ultimately to control its course) and commitment to sound principles of design and aspirations to justice, including the principle of judicial independence. The provisions for amending the Constitution are plainly written and specific, suggesting that enacting an amendment violates no rule of law conception of the Constitution as a stable governing instrument. The amendment process of Article V requires that multiple majorities in many locations must be convinced of the need to act—whether in response to a judicial decision or otherwise—before a change in the text can be made.¹⁰⁴ Although the amendment process has been criticized for being too rigid (in the sense of demanding more supermajorities than many other modern constitutions), it surely cannot be faulted for making amendment too easy. Friedman's book offers an important set of explanations for why evolution in the law by interpretation is not inconsistent with democracy; but it offers no claim that evolution by interpretation is *more* democratically legitimate than change that is made by constitutional amendment.

Political fights about who is appointed to the Court are a much more indirect way for a democratic polity to redirect constitutional law; they also permit constitutional law to be redirected (perhaps for long periods) based on what may be relatively short-term political shifts in the Presidency and the Senate, in some contrast to the kind of mass political action required to initiate and succeed in the amendment process. As will be noted below, there may be socio-cultural costs of moving to amend, especially of moving to amend a rights-protecting part of the Constitution, costs that may affect the willingness of the Court and our society in the future to protect the

¹⁰⁴ Requiring multiple and/or supermajority votes is perhaps not a bad procedural indicia of the kind of issue on which amendments should be sought, although substantive criteria might also play a role in guiding those dissatisfied with a judicial decision as to when to seek to invoke this process and when not to. On procedure: If one were drafting an amendment process today, greater care might be taken to assure that there is a national population majority in the second phase of that process and that this majority has some degree of generational contemporaneity. See, e.g., AUSTRALIAN CONSTITUTION ch. VIII, § 128 (requiring a majority of the states and a majority vote of the entire population to amend the constitution).

rights of those with whom public officials or a majority of the population disagrees. But there are also costs to the democratic spirit and the foundation of the Constitution in public consent to ruling amendment out.¹⁰⁵

Kathleen Sullivan distinguished, in her attack on “amendmentitis,” “structural” reasons from more transitory ones, recognizing that structural concerns about the entrenchment of political power might appropriately support amendment.¹⁰⁶ There is a serious argument that the effects of corporate spending on the democratic, representative quality of our elected officials represents a significant “structural” reason for amendment. In the context of interpretation and invalidation of legislation, John Hart Ely famously argued for judicial restraint except when there was good reason to believe the political process would not self-correct, whether because of prejudice against minorities or because of existing and entrenched obstructions to the proper working of the democratic process.¹⁰⁷ The suggestion here is that invoking the constitutional amendment process—and the related higher degree of public involvement that it can occasion—may be appropriate where a Court decision itself has the effect of entrenching obstructions to the working of the democratic process in ways that will prevent that process from self-correcting in the future.¹⁰⁸ Yet, as discussed below, the potential that such an amendment could have an adverse effect on the constitutional protections for a vibrant democracy must also be considered.

As noted above, there are a number of serious objections and possible risks to the course of seeking an amendment. Will an amendment in response to a decision concerning “rights” under the First Amendment be interpreted by the Court to have radiating effects in enhancing government powers over speech more generally? Will an amendment in response to a Court decision “chasten” or intimidate the Court into not taking other decisions it fears will be unpopular? Will enacting an amendment in this circumstance encour-

¹⁰⁵ Cf. LEARNED HAND, *The Spirit of Liberty* (May 21, 1944) in *THE SPIRIT OF LIBERTY PAPERS AND ADDRESSES OF LEARNED HAND* 190 (Irving Dilliard ed., 3d ed. 1960) (“Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.”).

¹⁰⁶ See sources cited *supra* note 10.

¹⁰⁷ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹⁰⁸ See generally CITIZENS FOR THE CONSTITUTION, *supra* note 83 (discussing guidelines for constitutional amendments that make our system of government more politically responsive).

age disrespect for the Constitution, or lead to a plethora of amendments that could be destabilizing? Would it open up other issues for amendment that opponents of *Citizens United* would not want to see?

Efforts to enact a constitutional amendment might be viewed by some as an undesirable concession that *Citizens United* was correctly decided. Is this a substantial reason not to seek an amendment? Was it a mistake to seek a child labor amendment in response to *Hammer v. Dagenhart*?¹⁰⁹ The effort to seek amendment did not prevent later successful efforts to change doctrine, in the movement from *Hammer* to the later New Deal cases. Likewise, the effort to obtain enactment of the Equal Rights Amendment may have facilitated the adoption of reasonably serious review of gender discrimination. True, the pendency of an amendment movement might be taken by some Justices as a reason for caution in moving away from the prior decision;¹¹⁰ but at the same time, its progress in the states might also help persuade others to rethink their understandings.

Second, as noted above, if an amendment were successful, important concerns about the scope of its interpretive effects across the whole Constitution would have to be considered. There is no doubt some uncertainty. Narrowly crafted amendments have on occasion been read very broadly;¹¹¹ but in some ways the existence of a text may

109 247 U.S. 251 (1918) (holding unconstitutional a federal statute prohibiting the shipment in interstate commerce of goods made through child labor), *overruled by* United States v. Darby, 312 U.S. 100, 116–17 (1941).

110 *Cf. Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (holding a statutory gender classification unconstitutional). In his separate opinion, Justice Powell disagreed with the plurality's view that gender classifications should be subject to the strictest form of scrutiny, and referred to the pendency of the Equal Rights Amendment as a reason not to adopt a "compelling state interest" test for strict scrutiny of gender classifications. He wrote:

The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Id.

111 The Court's Eleventh Amendment case law provides an example. Ever since *Hans v. Louisiana*, 134 U.S. 1 (1890) (concluding that the Amendment, which in terms prohibited suits by out-of-state citizens against a state, also precluded suits by a state's own citizens against the state), the Amendment has been read to stand for far more than its literal language embraces. *See, e.g., Alden v. Maine*, 527 U.S. 706, 730 (1999) ("To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in [the past . . .]"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54

merely provide an occasion for movement in an unexpected direction. In the first generation or so it seems likely that an amendment will be read to do what it was intended to do; after that, the realm of constitutional interpretive politics will require engagement to assure that its use is appropriate. There may well be risks that the amendment will have “radiating” effects, and would in the future be interpreted to permit greater government regulation of other forms of speech, or alternatively, of spending on other activities protected by the Constitution.¹¹² This would count as a worry, one that can be addressed—but without guarantees of success—by careful drafting of the amendment and its supporting explanations.

Third, it might be argued that resort to the difficult and time consuming amendment process should not be pursued until other, statutory approaches are exhausted; or that pursuing an amendment will sap political energy away from a more attainable and equally, if not more, effective legislative solution. Is there a principle of good constitutional behavior (or what we might call “pro-constitutional behavior”) not to resort to amendment until it is clear that statutory fixes won’t work? There is much to be said for that kind of presumption, for many of the reasons Sullivan discussed. But, as indicated above, there is at least some reason to worry that what we are facing may be a change in practice by business corporations that, if it gets going in substantial terms, may become entrenched in American politics in ways that over time will make it more and more difficult to undo and that may affect a wide range of issues on which business interests are in play. And it seems quite unclear whether efforts to mobilize support for an amendment will sap energy from legislative fixes rather than generate it.

Some raise objections to amending the First Amendment that draw on both institutional and substantive concerns as follows: The protection of freedom of speech is central to the viability of a robust democracy; the temptations to governments to stifle such speech are

(1996) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.” (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))). For a related example see Michelman, *supra* note 81, at 1360-61, noting the possibility that a narrowly crafted flag-burning amendment might “unravel the whole fabric of first amendment doctrine,” in discussing Walter Dellinger’s testimony opposing a constitutional amendment to overturn the Court’s flag-burning case law. See also *infra* note 124.

112 Cf. Deborah Hellman, *Money Talks But It Isn’t Speech* 19 (Univ. of Md. Sch. of Law, Working Paper, No. 2010-18), available at <http://ssrn.com/abstract=1586377> (discussing how regulation of expenditures to engage in constitutionally protected activity is distinct from regulating the protected activity itself).

well known; courts are the institutions least likely to require and most likely to protect against curtailment of speech in ways that damage the democratic process; and thus, in order to maintain a culture of robust and competitive speech a “prophylactic” approach must be taken that includes strong presumptions to avoid direct challenges (whether through amendment or otherwise) of judicial decisions enforcing rights of free speech (however erroneous those decisions are believed to be). This syllogism could be attacked.¹¹³ But even if one grants this set of arguments, there remains the question whether an occasion has arisen in which that presumption should be overcome.

Although the First Amendment’s language plainly implies protections of the ability of individuals, and the press, to speak freely, its language alone is silent on whether freedom of speech means the freedom of business corporations to spend unregulated amounts of treasury money to do so. Indeed the text alone, with its specific protection of the “press,” might be read to imply otherwise.¹¹⁴ The Court having interpreted the First Amendment to prohibit legislative regulation of corporate treasury expenditures on behalf of, or opposed to, particular candidates in particular elections, an amendment to address this narrow, but important, question should not be beyond the capacity of good lawyers to draft in ways that do not impair the Court’s capacity or inclination to enforce protections of individual speech rights—including the ability of *individuals* to pool their resources, as in PACs, or political parties, or membership associations to amplify individual voices through collective action.¹¹⁵ Although

113 For example, some might argue that the courts are no less likely to suppress speech than the other branches, but only that their opportunities to do so are more curtailed. Or it might be argued that prophylaxis is unnecessary or imposes other costs that are too high.

114 See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (noting that the press is “the only organized private business that is given explicit constitutional protection”). But cf. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 797–801 (1978) (Burger, C.J., concurring) (rejecting idea that press clause confers special status on press).

115 See *NAACP v. Button*, 371 U.S. 415, 452 (1963) (Harlan, J., dissenting) (“Freedom of expression embraces more than the *right of an individual* to speak his mind. It includes also his right to advocate and *his rights to join with his fellows* in an effort to make that advocacy effective.” (emphasis added)). Although the Court’s First Amendment jurisprudence generally does not distinguish among rights claimants based on their individual, associational, or corporate status, the character of a regulated entity as a for-profit business, rather than as an individual or a real membership association of a not-for-profit character that is concerned with advancing social or political purposes, may be relevant to the legitimate justifications of government action in some First Amendment contexts. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 665–66 (1990) (distinguishing among entities subject to regulation of their political expenditures based on their purposes, on whether their members or shareholders have incentives to disassociate from political acts they disagree with and on whether they are independent from influence by business corporations), *overruled by* *Citizens United v. Fed. Election Comm’n.*, 130 S. Ct. 876 (2010);

many are attached and attracted to the clarity of the First Amendment's command, "Congress shall make no law," it is equally clear that what "no law" means has been subject to considerable judicial interpretation. Some laws prohibiting speech (i.e., obscene speech, fraudulent speech) are permitted, so the "no law" part of the Amendment functions as a strong exhortation and presumption more than an operative rule. That is, interpretation of the First Amendment has resulted in a jurisprudence whose complexity belies the apparent clarity of the "make no law" language. The idea sometimes propounded, that an amendment would be the first "exception" to the principle of free speech, ignores the judicially recognized exceptions—for fraud, for obscenity, for defamation—long accepted.

There are, to be sure, important technical and legal challenges to drafting an amendment that would accomplish its goals without over-empowering legislatures. First, there may be important issues of substance on which proponents of an amendment disagree, concerning both the intended scope of a proposed amendment, and the best way to craft it, on which agreement would need to be reached.¹¹⁶ Wheth-

Fed. Election Comm'n. v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (holding FECA limits on corporate treasury expenditures in elections unconstitutional as applied to a nonprofit public interest group's expenditures). Compare *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85–88 (1980) (upholding state law prohibiting bans on public expressive activities in shopping centers against claim by shopping center of First Amendment right to exclude such activities on its property), with *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (invalidating state anti-discrimination law as applied to prohibit Scouts from excluding gay scout leaders as a violation of their First Amendment associational rights) and *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000) (invalidating state law requiring "blanket" primaries from which political parties could not exclude voters from outside the party).

- 116 Some might favor broader proposals designed to permit regulation of all corporate speech that the Court has found prohibited by the First Amendment. See *We the People? Corporate Spending in America After Citizens United: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Jeffrey Clements, General Counsel of Free Speech for People) (criticizing corporate speech doctrines more generally). Others might disagree: Even if one does not conceive of corporations as having rights like human beings, one can conceive of government attacking or suppressing corporate speech, because it disagrees, in ways that would diminish the vibrancy of our discourse. Moreover, it may be that some corporations would be willing to have a uniform rule in place that would prohibit them—and their competitors—from using corporate money to fund election campaigns. Corporations will not readily give up their other speech rights but might be quite happy to be relieved of the need to respond in election after election to candidate expectations of (if not requests for) expenditures. That is, a more narrowly-tailored amendment might appeal to the enlightened self-interest of business corporations in obtaining a uniform rule that would bind their competitors and take the issue of direct expenditures to influence elections off the table. For discussion of some of the political dynamics and advantages of amendment processes, see Mary Ziegler, *Ways to Change: A Reevaluation of Article V Campaigns and Legislative Constitutionalism*, 2009 BYU L. REV. 969.

er an amendment should authorize the regulation of all speech by “corporations,” or of all “political speech” by corporations (along the lines offered by Maryland Congresswoman Donna Edwards in House Joint Resolution 74)¹¹⁷, or only of corporate expenditures for “electioneering” activities on behalf of or in opposition to candidates for public office, raise difficult questions. On any approach, maintaining an exception for legitimate press activities would seem essential to the health of a democratic polity; if such an amendment, with such an exception, were to become law, it would be far more important than it has been up to now for legislatures and courts to provide definition to the contours of “the press,” a challenge of translation forward from the presses of the eighteenth century to the twenty-first-century multimedia journalistic complex, including online reporting and the “free press” role of blogs.¹¹⁸ There are risks of an amendment being read both too narrowly and too broadly: too narrow a reading, such as that given the Privileges and Immunities Clause of the Fourteenth Amendment through the *Slaughter-house Cases*,¹¹⁹ would allow Congress and the state legislatures too little room for legislation; too broad a reading might allow too much room for regulation of campaign finance and, as noted earlier, possibly loosen the constraints on government regulation of speech across a much broader swathe.

Thus, much would depend on the scope, clarity, and understood meanings of a proposed amendment. For example, one current proposal for an amendment states that “Congress and the States may regulate the expenditure of funds for political speech by any corporation, limited liability company, or other corporate entity.”¹²⁰ Imagine that a future city council prohibited corporate expenditures for speech in favor of “tax free zones,” but not other corporate speech; or imagine, perhaps more remotely, a prohibition on corporate speech on behalf of Republicans, but not speech on behalf of Demo-

117 H.R.J. Res. 74, 111th Cong. 2d Sess. (2010). The operative language of the proposed amendment reads as follows:

Section 1. The sovereign right of the people to govern being essential to a free democracy, Congress and the States may regulate the expenditure of funds for political speech by any corporation, limited liability company, or other corporate entity.

Section 2. Nothing contained in this Article shall be construed to abridge the freedom of the press.

118 On translation, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171–73 (1993) (analogizing the practice of faithfully interpreting laws over time to the practice of translation in language). Just as the Fourth Amendment’s ban on searches and seizures was translated forward to apply to electronic eavesdropping and oversight, so too the eighteenth-century concept of the press is capable of being translated forward.

119 83 U.S. (16 Wall.) 36 (1873).

120 H.R.J. Res. 74; see *supra* note 117.

crats: Would the language of this amendment be read to shelter such regulations from attack as violations of the Due Process or Equal Protection Clauses of the Constitution? Is there a risk that such an amendment would be construed as a plenary grant of authority not subject to limitations by any already existing provisions of the Constitution?¹²¹

Would an amendment drafted, instead, to say “*The First Amendment shall not be construed to prohibit Congress and the states from regulating the expenditure of funds for political speech by any corporation,*” better avoid this risk? Would it allow more room for a court to prohibit, as a violation of the due process or equal protection standards, such partisan (and, in current First Amendment lingo, “viewpoint-based”) distinctions?¹²² Or would this version (or perhaps other versions) of such a hypothetical amendment allow too much room for courts to use other clauses of the Constitution to re-impose most or

¹²¹ Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 406 (1992) (White, J., concurring in the judgment) (disagreeing with the Court’s First Amendment analysis of the constitutionality of a “hate speech” statute and arguing that “[a] defamation statute that drew distinctions on the basis of political affiliation or ‘an ordinance prohibiting only those legally obscene works that contain criticism of the city government,’ [quoting the majority] would unquestionably fail rational-basis review” under the Equal Protection Clause).

¹²² An alternative might be an amendment whose first section went something like this:

The First Amendment shall not be construed to prohibit Congress and the states from regulating the expenditure of funds for political speech or communications, on behalf of or in opposition to the election of one or more candidates for public office, by any corporation.

Narrowing the grant of authority to the regulation of corporate expenditures of funds for *electioneering* activity would leave existing First Amendment protections of other corporate speech on political issues in place. For those opposed in principle to parity for corporate persons (as compared to natural persons) in the protection of constitutional rights in general, or free speech rights in particular, this may be unacceptably narrow. However, the heart of the democratic process in a representative democracy like ours seems most directly in play in the election of public officials, at least at the federal level where referenda are not allowed. Corporate speech on public issues can be valuable, particularly where the issues are about which business corporations, or labor unions, have special knowledge and the risks of government suppression based on viewpoint might be considerable. An amendment drafted to say only that “the First Amendment shall not be construed to prohibit” would not remove the possibility of due process or equal protection challenges, allowing judicial review under those clauses to prevent abusive or discriminatory regulation (though carrying with it a risk that these latter clauses might be relied on to undo the intended effect of the amendment). Perhaps most importantly, an amendment narrowly drawn to authorize government regulation only of electioneering speech might actually win support from many corporations, *see supra*, note 116, thus increasing the chances of its being enacted.

Other issues would need to be addressed, including the scope of an exception for the press, which any such amendment ought to include, and whether the amendment should authorize legislative regulation of all corporate and limited liability entities or only of those posing the special risks of for-profit business corporations and not-for-profits closely related to or funded by for-profit businesses.

all of the doctrine the amendment is designed to overturn? The latter result would appear to require so much bad faith in judicial interpretation that it seems most unlikely, at least soon after enactment; plainly such an amendment would have been intended to have some effect in permitting regulation not previously permitted. But there is much to be debated and discussed as to the form of an amendment, and its intended effects on allowing legislative discretion.¹²³

* * *

It is beyond the scope of this Article to analyze all of these issues or to draw a firm conclusion on whether, given the risks and benefits, an amendment of the Constitution is the most appropriate response to *Citizens United*, or if it is, what form it should take. The suggestion is, however, that notwithstanding Friedman's book, the people should at times seriously consider amendments; and, moreover, that there are some reasons why the *Citizens United* decision is an appropriate occasion for such serious consideration.

The hesitation of people of constitutional goodwill to seek amendment of the Constitution is understandable, and, in many respects, wise. But at the same time, "amendophobia," or a tendency to discount amendment as a possible response to a constitutional decision also might be thought to sap the system of an important method of reinvigorating our Constitution and of maintaining an appropriate balance between judicial interpretation and public decision making over what the Constitution should mean. Barry Friedman's argument that 1937 represented a decision by the people that constitutional amendment through interpretation was legitimate if the interpretation was within some mainstream set of beliefs was not, I assume, meant to suggest that Article V amendment has been or should be abandoned as a method of legitimate constitutional change.

The "will of the people" can be expressed in many ways, and there is something to be said for its expression in a written text, through a formal process of iterative discussion and voting, with the acknowl-

¹²³ A proposed amendment in the 1990s reportedly would have sought to overturn that part of *Buckley v. Valeo* that prohibited legislatures from imposing expenditure limits on candidates, by authorizing Congress and the states to establish money limits on the amounts candidates could spend on elections. See CITIZENS FOR THE CONSTITUTION, *supra* note 83, at 4-5; see also H.R.J. Res. 119, 105th Cong. (1998). Questions have been raised whether such an approach would be too narrow, in not allowing the government to regulate issue advocacy that may be aimed at influencing elections of particular candidates. CITIZENS FOR THE CONSTITUTION, *supra* note 83, at 19.

edged purposes of achieving constitutional change.¹²⁴ So Barry Friedman's book not only provides a compelling narrative of the Supreme Court's relationship to the "will of the people," but raises large questions for us to consider and for future research.¹²⁵ These questions are not only about whether the Justices are "independent" enough, but also about whether "the people" have allowed the Article V amendment power to atrophy. Do we now have a constitutional "convention" against formal amendments? Or can the "will of the people" shift modalities and reassert itself through the formal amendment process? Friedman's eloquent and thoughtful narrative of the role of public opinion in shaping the Supreme Court's choices is a joy to read. Perhaps in the future he will bring his analytical, historical, and narrative talents to bear on other modalities for constitutional change.

¹²⁴ When the "flag burning" amendment was proposed in response to the Supreme Court's decisions in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), some commentators argued that such an amendment would itself be unconstitutional. See Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073–74 (1991) (arguing that the right to free speech is a natural right retained by the people that cannot be taken away "even by consent"). Given the Court's retreat from reviewing even procedural challenges to the amendment process, see *Coleman v. Miller*, 307 U.S. 433 (1939), there is very little likelihood that the Court would even consider a substantive challenge to an amendment. Moreover, it would be difficult to make a convincing argument sounding in the premises of constitutionalism for the Court to declare an amendment substantively unconstitutional: The great difficulty and multiple deliberation and filter points for amending the U.S. Constitution increases the likelihood that an amendment will reflect a substantial supermajority in favor of the change, and there is no positive basis in constitutional text to declare an amendment substantively unconstitutional, with the exception of the provisions of Article V relating to equal suffrage in the Senate. See Vicki C. Jackson, *Unconstitutional Constitutional Amendments* (Aug. 11, 2010) (unpublished manuscript) (on file with author).

¹²⁵ See FRIEDMAN, *supra* note 9, at 373–74 (suggesting that "[w]hat we know is tentative," and may be seen as "an agenda for further research," that can "move past the question of whether the justices are influenced by popular opinion . . . [and] tackle the really meaningful question of when and how the justices are free to stand up to the popular will in the name of the Constitution").